



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Intellectual Properties, Inc.

File: B-280803

Date: November 19, 1998

John C. McIntosh and Robert G. McIntosh for the protester.
William S. Zanca, Esq., Ballistic Missile Defense Organization, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of agency's determination not to award the protester phase II funding for a project the protester proposed under the Department of Defense Small Business Innovation Research program is sustained where the agency's determination was primarily based upon the protester's lack of private sector funding for its phase II proposal, which was inconsistent with the evaluation criteria set forth in the solicitation.
2. Agency's post-award reevaluation of the protester's proposal and determination that the proposal could have been rejected for a completely different reason than originally asserted by the agency does not establish that the protester was not prejudiced by the agency's initial evaluation, which was inconsistent with the solicitation's evaluation criteria, because the reevaluation was prepared in the heat of an adversarial process and may not represent the fair and considered judgment of the agency.

DECISION

Intellectual Properties, Inc. (IPI) protests the Ballistic Missile Defense Organization's (BMDO) determination not to award it phase II funding for a project IPI proposed under the Department of Defense (DOD) Small Business Innovation Research (SBIR) program. IPI contends that its proposal to perform research on "Passive Multistatic Hitchhiking Array for Search and Track" would have been funded if BMDO had evaluated IPI's proposal in a reasonable manner consistent with the evaluation criteria set forth in the solicitation.

We sustain the protest.

The SBIR program is conducted pursuant to the Small Business Innovation Development Act, 15 U.S.C. § 638 (1994 & Supp. II 1996), which requires certain

federal agencies to reserve a portion of their research and development funds for awards to small businesses. The program is made up of three phases.

The program description set forth in the solicitation provided that "[p]hase I is to determine, insofar as possible, the scientific, technical, and commercial merit and feasibility of ideas submitted under the SBIR program." DOD Fiscal Year 1997 SBIR Program Solicitation 97.1 at 1. The solicitation added with regard to phase I that "[p]roposals should concentrate on that research or research and development which will significantly contribute to proving the scientific, technical, and commercial feasibility of the proposed effort, the successful completion of which is a prerequisite for further DoD support in Phase II." Id.

Firms that receive phase I awards may submit proposals for further development work under phase II of the SBIR program. The solicitation's program description provided that "[s]ubsequent Phase II awards will be made to firms on the basis of results of their Phase I effort and the scientific, technical, and commercial merit of the Phase II proposal." Id.

Phase III contemplates, unlike phases I and II, that non-SBIR funds will be used to pursue commercial applications of research and development. Microexpert Sys., Inc., B-233892, Apr. 13, 1989, 89-1 CPD ¶ 378 at 1. Specifically, the program description on page 1 of the solicitation stated with regard to phase III that "[u]nder Phase III, the small business is expected to use non-federal capital to pursue private sector applications of the research or development."¹

Section 4.3 of the solicitation set forth the following evaluation criteria for phase II proposals:

- a. The soundness and technical merit of the proposed approach and its incremental progress toward topic or subtopic solution.
- b. The potential for commercial (government or private sector) application and the benefits expected to accrue from this commercialization.
- c. The adequacy of the proposed effort for the fulfillment of requirements of the research topic.
- d. The qualifications of the proposed principal/key investigators supporting staff and consultants. Qualifications include not only the ability to perform the research and development but also the ability to commercialize the results.

¹There is also provision, in section 4.5 of the solicitation, for "fast-track" awards for companies that obtain funding commitments from other sources during Phase I. This protest does not involve an award under the fast-track program.

With regard to the term "commercialization," section 2.7 of the solicitation specifically defined it as:

The process of developing markets and producing and delivering products for sale (whether by the originating party or by others); as used here, commercialization includes both government and private sector markets.

Section 4.4 of the solicitation provided:

A Phase I or Phase II proposal's commercial potential can be evidenced by:

- (1) the small business concern's record of commercializing SBIR or other research,
- (2) the existence of second phase funding commitments from private sector or non-SBIR funding sources,
- (3) the existence of third phase follow-on commitments for the subject of the research, or
- (4) the presence of other indicators of commercial potential of the idea.

In addition, section 1.3 of the solicitation noted that "[w]hen several Phase II proposals receive evaluations being of approximately equal merit, proposals that demonstrate such a commitment for follow-on funding will receive extra consideration during the evaluation process."

As indicated, IPI received a phase I award, and subsequently submitted a proposal seeking phase II funding. IPI's phase II proposal included, among other things, a letter from a private firm stating that it has "teamed with [IPI] in their Phase II effort" and is prepared to "contribute intellectual capital and other resources" in support of IPI's phase II effort. Agency Report, Tab 2.

The record of the agency's contemporaneous evaluation of IPI's phase II proposal consists of two completed evaluation forms. Agency Report, Tab 3. These forms include a number of questions, and provide spaces for the evaluator to respond to the questions as well as spaces for the evaluator to recommend the acceptance or rejection of the proposal. The questions set forth on the forms are as follows:

- (1) How does the technology support BMDO?
- (2) What (and how much) is the novelty?
- (3) Did Phase 1 succeed?
- (4) What technology will BMDO programs be able to leverage during/after Phase 2?

(5) What is the future market potential and the firm's market attitude?²

One of the evaluations, which is hand-written, one page in length, and cursory in approach, recommended the rejection of IPI's phase II proposal. Agency Report, Tab 3. This evaluator answered the question as to whether phase I succeeded by stating only that "I no longer have the Phase 1 proposal, but it seems as if it did succeed, although the company also discovered all the difficulties now facing them." With regard to the question concerning "future market potential and the firm's market attitude," the evaluator provided only that "I'm not sure how this technique improves on current market technology for the applications it proposes."

The other evaluation, which is typewritten and approximately 1 1/2 pages in length, contained significantly more detail and ultimately recommended that IPI's phase II proposal be accepted. Id. In responding to the question asking whether Phase I succeeded, the evaluation provided a relatively detailed explanation regarding the tasks successfully completed by IPI during phase I and certain experiments that were conducted and their results. The evaluation stated here that "[t]he phase I effort exceeded its requirements." The evaluation's response to the question concerning future market potential and IPI's market attitude was similarly detailed, stating that "[t]his technology has some commercial market potential, but has a greater military potential." The evaluation briefly described how the technology could be used by military and private sector interests, and concluded that "[t]hese private sector applications have a good market potential."

The protester was informed by letter from the cognizant BMDO Program Manager that its phase II proposal had not been approved for funding. Agency Report, Tab 1A. IPI requested a debriefing. Agency Report, Tab 1B. The Program Manager responded by letter, Agency Report, Tab 1C, as follows:

This effort was not funded because your Phase II did not exhibit a commercialization potential consistent with the implementation of the BMDO SBIR Program. Although [a private firm] provided a Letter of Support, which indicated that they would contribute "intellectual capital and other resources," the degree and value of that support could not be clearly defined within the context of the proposal. Furthermore, there was no indication that your company

²We note that the evaluation form questions do not appear to encompass all of the evaluation criteria set forth in the SBIR Program solicitation. For example, the forms do not provide for any consideration of the solicitation's "qualifications of the proposed principal/key investigators supporting staff and consultants" evaluation criterion.

would have any viable commercial product at the conclusion of the effort that would have an impact in the marketplace.

The record does not contain any other contemporaneous documentation as to why the agency chose not to fund IPI's phase II proposal.

IPI argues that the agency did not properly apply the evaluation criteria stated in the SBIR program solicitation in determining not to fund IPI's phase II proposal. Specifically, IPI argues that the letter it received from the BMDO Program Manager in response to its debriefing request indicates that BMDO's decision not to fund IPI's proposal was based solely on IPI's lack of private sector funding for its phase II proposal, rather than a reasoned evaluation of IPI's proposal under the criteria set forth in the SBIR program solicitation.

Agencies have broad discretion to determine which proposals will be funded under the SBIR program. Deborah Bass Assocs., B-257958, Nov. 9, 1994, 94-2 CPD ¶ 180 at 3; Microexpert Sys., Inc., *supra*, at 2. Our Office will review such determinations to see whether they were made consistent with the terms of the solicitation and any applicable statutes or regulations, or whether the agency acted fraudulently or in bad faith. Microexpert Sys., Inc., *supra*.

The agency, in its report, essentially concedes that IPI's lack of private sector funding was the primary reason for the agency's determination not to fund IPI's phase II proposal. For example, the agency refers to the letter submitted by IPI from the private firm described above and argues that "this letter did not fulfill the SBIR [solicitation] and BMDO requirements that 'commercialization potential' be demonstrated." Agency Report at 7. The agency points out that the letter's "language did not commit [the firm] in any manner to any capital infusion or anything firm enough to even remotely suggest a financial commitment had been undertaken," and that because of this, the agency determined that "IPI had not provided adequate evidence that IPI met the Phase II requirement for 'potential for commercial (government or private sector) application' as stated in paragraph 4.3 and re-iterated throughout the [solicitation] and its implementing guidance." *Id.*

The agency argues that its determination not to fund IPI's phase II proposal because of IPI's lack of private sector funding was appropriate. In this regard, the agency first points to the "potential for commercial (government or private sector) application and the benefits expected to accrue from this commercialization" evaluation criterion, and asserts that this criterion requires that the commercial potential of an offeror's proposal be assessed during the evaluation process. The agency next points to section 4.4 of the solicitation, which, as quoted above, addresses the assessment of the commercial potential of proposals, and provides at section 4.4(2) that a proposal's commercial potential can be evidenced by "the existence of second phase funding commitments from private sector or non-SBIR funding sources." The agency thus concludes that because the solicitation provided

for the evaluation of commercial potential, and stated that commercial potential could be demonstrated by the existence of private sector funding, its evaluation of IPI's phase II proposal and determination not to fund it because it lacked private sector funding were consistent with the terms of the solicitation.

We agree with the agency that, as the result of the above two sections, the SBIR Program solicitation, while not a model of clarity, can reasonably be read as providing for an agency's consideration of a firm's private sector funding commitments (or lack thereof) for its phase II proposal in determining whether it should award the firm phase II funding. However, while such a consideration appears permissible, the solicitation does not, by its terms, allow for an offeror's lack of private sector funding to be the only consideration in determining the "commercial potential" of an offeror's phase II proposal. That is, section 4.4 provides that a phase II (or I) proposal's commercial potential may also be demonstrated by, among other things, "the presence of other indicators of commercial potential of the idea." There is no indication that the agency, in determining not to fund IPI's phase II proposal ever considered whether there were "other indicators of commercial potential of [IPI's] idea."

In sum, we agree with the agency that consideration of IPI's lack of private sector funding for its phase II proposal was appropriate. However, the agency's reliance on this consideration as the primary basis for its determination not to fund IPI's proposal, without consideration of whether there were other indicators of commercial potential for IPI's idea, was inconsistent with the terms of the solicitation.³

In its report, the agency argues that, in addition to IPI's lack of private sector funding for its phase II proposal, its proposal was rejected because there was no "other data in the proposal to support any reasonable expectation of possible government sector application." Agency Report at 7. It is unclear from the record whether the agency's assertion here is related to its comment in the debriefing letter to IPI that "[f]urthermore, there was no indication that your company would have any viable commercial product at the conclusion of the effort that would have an impact in the marketplace," or constitutes a new reason for rejecting IPI's proposal raised for the first time in the agency's report. In either case, this assertion is unsupported by the record, and because of this, we simply cannot determine whether the agency had a reasonable basis for this conclusion. Matrix Int'l Logistics, Inc., B-272388.2, Dec. 9, 1996, 97-2 CPD ¶ 89 at 5.

³While, as noted above, the solicitation also provided that private sector funding would be a tie-breaker to decide among approximately equal phase II proposals, there is no indication that the provision played this role here.

Specifically, IPI's phase II proposal includes a section entitled "Anticipated Benefits/Potential Commercial Applications of the Research or Development" which summarizes the potential military and commercial uses of its effort.⁴ Agency Report, Tab 2, IPI Phase II Proposal, Appendix B. This section appears to describe indicators of commercial potential consistent with the definition of commercialization stated in the solicitation. As mentioned previously, one evaluator, in responding to the evaluation question "What is the future market potential and firm's market attitude?" discussed in some detail the proposed technology's potential military and civilian applications. Agency Report, Tab 1C.

In its report, the agency submitted an additional evaluation of IPI's proposal prepared in response to the protest, which recommends "Rejection for lack of technical merit." Agency Report, Tab 8. The agency notes here that the "results of this re-evaluation are not being used by BMDO to justify the basis for the non-award, nor to justify the BMDO's position that the original decision was proper." Agency Report at 12. The agency states that "the re-evaluation was done because of the lack of clear information on the technical viability of [IPI's] original Phase II proposal," and that, "even if it is determined that commercialization was not a proper concern, award would still not be recommended to IPI at this time because of the original technical concerns as confirmed by the supplemental issues raised by the second set of evaluators." Agency Report at 12-13.

It is apparent from the record that this post-protest evaluation was performed to demonstrate that the protester was not prejudiced by the agency's initial rejection of IPI's phase II proposal. The agency is, in effect, contending that, even if it did fail to evaluate IPI's phase II proposal consistent with the evaluation criteria set forth in the solicitation, this failure did not harm IPI, since the agency would have rejected the proposal for lack of technical merit.

We are not persuaded by the agency's argument that there was no reasonable possibility of prejudice. Although our Office considers the entire record in determining the reasonableness of an agency's evaluation and award decision, including statements and arguments made in response to a protest, we accord greater weight to contemporaneous materials rather than judgments made in response to protest contentions, such as the agency's reevaluation here. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

⁴Our discussion here is deliberately vague regarding the actual contents of IPI's phase II proposal because of its proprietary nature. We also note that the protest pleadings point to a number of potential military and civilian applications for IPI's proposed technology.

As pointed out above, the agency does not believe that it erred in its initial evaluation and rejection of IPI's phase II proposal. Rather, the agency is attempting to defend, in the face of a bid protest, its prior rejection of IPI's phase II proposal through the submission of a new evaluation that, according to the agency, justifies the rejection of IPI's proposal on an entirely different basis (lack of technical merit) from that previously asserted (inadequate commercialization potential because of lack of private sector funding). The lesser weight we accord the agency's post-protest reevaluation reflects the concern that, because it was prepared in the heat of an adversarial process, it may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process.⁵ Id. Here, not only has the protester responded in detail to the agency's after-the-fact technical evaluation, but that post-protest evaluation also conflicts with the initial, relatively detailed evaluation of IPI's proposal.

Accordingly, we sustain the protest. We recommend that the agency reevaluate IPI's phase II proposal in a reasonable manner consistent with the evaluation criteria set forth in the solicitation, and reconsider whether IPI's phase II proposal should be funded. We also recommend that IPI be reimbursed the costs of filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d) (1998). IPI's certified claim for such costs, detailing the time and costs incurred, should be submitted within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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⁵The agency also attempts to support its initial rejection of IPI's phase II proposal by asserting in a supplemental report that "[w]hile the Program Manager may have ended up with a consideration of the public or private financing, that issue alone was not determinative of the decision. The decision was about commercial potential." Supplemental Report at 3. The agency's arguments here are made by agency counsel without supporting documentation from either the Program Manager or any agency evaluators, and like the reevaluation discussed above appear to constitute new analysis in an effort to defend the agency's prior decision. As such, these assertions do not render the agency's prior determinations reasonable.